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December 18, 1995

The Honorable Dan Morales
Attorney General
State of Texas
Post Office Box 12548
Austin, Texas 78711

An issue has been brought to my attention regarding the use of state lands. Specifically, without the state's permission, can the federal government condemn and take patented lands in the state of Texas and hold such lands when no longer used for the purpose the lands were originally conveyed? Can property conveyed with this restriction be converted by the federal government to other purposes once the mission of the patent has been exhausted?

As prior correspondence related to this matter cannot be located, I would ask that you expedite your decision in this case. I respectfully request a formal opinion from your office regarding this issue. Should you need further information, please contact Brian K. Jammer in my Capitol office.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Armbrister", written over a horizontal line.

Ken Armbrister
Chairman

KA/bkj

MEMORANDUM

Can the federal government condemn and take a patent title to land within the State of Texas? Generally, no. The State of Texas is unique in that it, by express Congressional resolution, retained sovereignty over all lands within its boundaries, when it became a state. Condemnation by the federal government of land within Texas requires approval of the State, and the approval in the Texas statutes is for specific limited purposes. Additionally, where the State of Texas has issued a patent title to land, it relinquishes rights over that land and title and cannot allow the federal government to condemn the title itself.

FACTS

Patent titles to various lands on Matagorda Island were issued to H.W. Hawes on various dates on or about 1873 by the State of Texas under scrip from the Republic of Texas. The property in question has been in continuous ownership and possession of H.W. Hawes or his heirs since the patent title was issued.

In 1940 the United States began condemnation proceedings to take the land in question. The condemnation was expressly brought to allow use of the land for military purposes under 10 U.S.C. 1343a, et seq. The condemnation was amended to only take the surface estate (deleting the minerals) and also to limit the term of the taking.

In 1975 the property was no longer needed for military purposes and the U.S. Department of Defense turned it over to the U.S. Department of Interior for use as a wildlife area. The property continues to be used as a wildlife area today.

UNIQUE POSITION OF THE STATE OF TEXAS

The Republic of Texas was proclaimed on March 2, 1836, and the United States recognized the republic the next year.¹ Texas was admitted to the Union as a state in 1845 with a Joint Resolution of Congress providing:

Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to

¹ Senate Resolution March 1, 1837 (Cong. Globe, 24th cong., 2d Sess., p. 270). See, United States v. State of Texas, 339 U.S. 707, 713 (1950).

the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States.

Joint Resolution of Congress, March 1, 1845, 5 Stat. 797 (emphasis added). This unique grant of retention of sovereignty over land within its borders required that Texas consent to any acquisition of ownership of such land by the federal government. The consent was provided by statute from the Texas Legislature:

(a) The legislature consents to the purchase or acquisition by the United States, including acquisition by condemnation, of land in this state made in accordance with this subchapter.

(b) The United States may purchase, acquire, hold, own, occupy, and possess land in this state that it considers expedient and that it seeks to occupy as a site:

(1) on which to erect and maintain a lighthouse, fort, military station, magazine, arsenal, dockyard, customhouse, post office, or other necessary public building; or

(2) for erecting a lock or dam, straightening a stream by making a cutoff, building a levee, or erecting any other structure or improvement that may become necessary for developing or improving a waterway, river, or harbor of this state.

Tex. Government Code §2204.101 (West Pamph. 1996) (See, also, Tex. Rev. Civ. Stat. Ann. Art. 5242 in effect at the time of the 1940 condemnation). The federal government, by ceding sovereignty to Texas over Texas lands, has no general condemnation authority over Texas lands beyond that authorized by the State of Texas.

PATENT TITLE

"A patent is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal." United States v. Stone, 69 U.S. 525, 535 (1864). "With the [patent] title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed." Moore v. Robbins, 96 U.S. 530, 533 (1877).

While still a republic, Texas issued land scrip, signed by President Sam Houston, authorizing the purchaser to acquire a

patent title to land within the republic.² After becoming a state, Texas issued patent titles to land to those who purchased the scrip and met the other requirements to be issued a patent title. H.W. Hawes on Matagorda Island purchased the scrip, met the requirements and was issued patent titles to the lands in question in 1873. There was no limitation on the patent title granted to H.W. Hawes, and the patent title, signed by Governor, was to "the said Hugh W. Hawes and his heirs or assigns Forever, all the right and title in and to said Land, heretofore held and possessed by the said State, and I do hereby issue this Letter Patent for the same."³ There has been no challenge to the validity of the H.W. Hawes patent title. Texas, by issuing a patent title to H.W. Hawes, has relinquished its authority over that patent title.

FEDERAL CONDEMNATION ON MATAGORDA ISLAND

The federal condemnation of land owned by H.W. Hawes on Matagorda Island was initiated under Civil Action No. 55 and completed under Civil Action No. 22 in the U.S. District Court for the Southern District of Texas. The Declaration of Taking expressly provides that the land is being taken "for military purposes" under the 1935 War Powers Act. Although the original Declaration of Taking stated that the "fee simple absolute" was being taken, a subsequent amendment stated that:

the lands described in the original declaration of taking are now taken for the public use of the United States of America for military purposes, in fee simple absolute excepting all oil, gas and other minerals in and under said land, the land so taken however to be for a period of ten years from November 8, 1940, or for such lesser period as the Secretary of War may determine to be consistent with the public use for which said land is taken, free and clear of all surface easements and rights of occupancy and use of the surface thereof for the purpose of exploring, mining and removing oil, gas and other minerals therefrom."

Amendment to Declaration of Taking, Civil Action No. 22, Dec. 2, 1941 (emphasis added).

EFFECT OF CONDEMNATION ON PATENT TITLE

The declared use "for military purposes" in the Matagorda Island condemnation is generally within the grant of condemnation by the Texas legislature. Tex. Gov't Code §2204.101. The Texas legislature did not grant the federal government authority to condemn a patent title issued by the State of Texas. Under the

² See, e.g., Land Scrip No. 40, Exhibit A to this opinion.

³ See, e.g., Patent Title June 11, 1873, Exhibit B to this opinion.

legislative authority granted it, the federal government could only condemn the use of land held under a patent title, and then only for uses specified in the Texas granting statute. Given the unique nature of a patent title, the State could not authorize the federal government to condemn such a title because the State had relinquished all authority over the patented land. Moore v. Robbins, 96 U.S. at 533; State v. Bradford, 121 Tex. 515, ___, 50 S.W.2d 1065, 1079-80 (Tex. 1932). Since the State of Texas had exclusive domain over the vacant lands in Texas at the time of statehood and relinquished all authority over the patented lands in the Letter Patent title, Texas must defend the patent title against claims by the federal government. In particular, where the federal government attempts to condemn the patent title itself or exceeds the uses allowed by the Texas legislature, the State of Texas should defend the patent title against the federal government. Bradford, 50 S.W.2d at 1080.

Given the unique nature of patent titles and the condemnation proceedings (which were for specific purposes, which expressly excluded the mineral estate, and which appear to have taken the use of the land for only a ten year period), the patent title appears to be intact in the heirs of H.W. Hawes. When the federal government ceased to use the land for the purposes for which its use was condemned, the heirs should be able to assert their patent title and reclaim the use of the land. The State of Texas, as the originator of the patent title, should defend the title against the federal claims.